

[Submitting counsel below]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**IN RE: UBER TECHNOLOGIES, INC.,
PASSENGER SEXUAL ASSAULT
LITIGATION**

No. 3:23-md-03084-CRB

**PLAINTIFFS' BRIEF IN SUPPORT OF
PROPOSED PRIVILEGE ORDER**

This Document Relates to:

All Cases

Judge: Honorable Lisa J. Cisneros

Date: TBD

Time: TBD

Courtroom: G – 15th Floor

INTRODUCTION

Plaintiffs’ proposed Privilege Order (“PO”) allows Defendants Uber Technologies, Inc., Rasier, LLC and Rasier-CA, LLC’s (collectively, “Uber”) to provide easily-accessible and straightforward information related to Uber’s claims that certain documents and/or communications are privileged, to permit the parties and the Court to efficiently ascertain such privilege claims, and to expeditiously resolve any privilege disputes. Plaintiffs’ proposed PO accomplishes these goals while avoiding overbroad or unduly burdensome requirements that will only cause delay. While the parties were able to significantly narrow their disputes, important differences between the parties’ proposals remain. For the reasons explained below, the Court should adopt Plaintiffs’ proposed PO. *See* Pls.’ proposed PO, attached hereto as Exhibit A; Pls’ proposed PO with Defendants’ proposed edits, attached hereto as Exhibit B.

ARGUMENT

Federal Rule of Civil Procedure 26(b)(5) provides “[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: ... (i) expressly make the claim; and ... (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Consistent with Rule 26(b)(5), the requisite details included in a privilege log generally consist of a description of responsive material withheld, the identity and position of its author, the date it was written, the identity and position of all addressees and recipients, the material’s present location, and specific reasons for its being withheld, including the privilege invoked and grounds thereof. *See, e.g., In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Blanket assertions of privilege are “extremely disfavored” in the Ninth Circuit. *See Clarke v. Am. Com. Nat’l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). Rather, “[t]he privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity.” *Id.*

Plaintiffs’ proposed PO accomplishes these goals and should be adopted.

I. Uber’s Proposed Categorical Privilege Log Omits Critical Information Necessary to Evaluate Privilege Claims [Ex. B, Paragraph 19]

Uber proposes it be allowed to log documents on a “categorical basis” based on content and provide only a broad categorical privilege log that lacks the details required by Rule 26. Uber’s proposed categorical privilege log will prevent Plaintiffs from properly ascertaining Uber’s privilege claims, will lead to unnecessary disputes and litigation, and should be rejected.

As Uber is aware, in large, complex MDLs involving a high volume of anticipated document discovery, parties are routinely required to produce detailed information for each individual document that is withheld, including descriptions of the subject matter of the individual documents. *See In re Denture Cream Prods. Liab. Litig.*, No. 09–md-2051, 2012 WL 5057844, *9 (S. D. Fla. Oct. 18, 2012) (identifying information that should be included in privilege log, including, among other information, document title and description, subject matter addressed in document, and purpose(s) for which it was prepared or communicated); *In re Abilify (Aripiprazole) Prod. Liab. Litig.*, No. 16-md-2734, 2017 WL 6757558, at *3 (N.D. Fla. Dec. 29, 2017) (MDL Order requiring defendants to include on their logs: nature of privilege, factual basis for privilege, document date, author name and all recipients, identification of whether any person identified is attorney or employee of defendants’ legal department, description of general subject matter contained in document and type of document sufficient to allow plaintiffs to assess claimed privilege and to allow Court to rule on claimed privilege; location of document, and custodian name); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 19-md-2885, 2020 WL 1321522, at *2 (N.D. Fla. Mar. 20, 2020) (internal citation omitted) (parties required to describe nature of documents or communications in manner that would enable other parties to assess claim as required by Fed. R. Civ. P. 26(b)(5)(A) and identify “‘Custodial Source, To, From, Carbon Copy, Date, reason for privilege or immunity and a description sufficient to meet the requirement of Rule 26’; (2) ‘the production date of the document, or the production wave associated with the document’; and (3) identification of ‘[i]ndividuals who are In-House Counsel or Outside Counsel of Record.’”).

Here, Uber proposes a privilege log that is essentially void of all information required for

Plaintiffs to ascertain the nature and merit of Uber’s claimed privileges. This is highly prejudicial to Plaintiffs. Specifically, Uber proposes grouping all purportedly privileged information into unspecified groups of unknown date ranges and people, without subjects or document titles or any other detail. It will be all but impossible for Plaintiffs to analyze Defendants’ privilege claims with these limitations. Detailed privilege logs ensure that the parties and the Court receive sufficient information to evaluate whether privilege claims are appropriate or overbroad. Uber’s proposal for categorical privilege logging does not and should be rejected. *See, e.g., In re McKinsey & Co., Inc. Nat’l Prescription Opiate Consultant Litig.*, No. 21-md-02996 (N.D. Cal. Mar. 6, 2023) (Breyer, J.), Dkt. 485 at ¶ 14, attached hereto as Exhibit C (“documents withheld on the basis of privilege will not be logged categorically”) (emphasis added); *Ritchie v. Sempra Energy*, No. 10-cv-1513, 2014 WL 12638874, at *2-3 (S.D. Cal. Aug. 4 2014) (denying defendant’s request for categorical privilege logging because “there is nothing to indicate that Sempra would be *unduly* burdened if it is required to prepare a privilege log”) (emphasis in original); *Narayan v. EGL, Inc.*, No. 05-cv-04181, 2006 WL 3050851, at *2 (S.D. Cal. Oct. 24, 2006) (denying request for categorical privilege logging); *Chevron Corp. v. Salazar*, No. 11-cv-3718, 2011 WL 4388326, at *1 (S.D.N.Y. Sept. 20, 2011) (categorical logs “obscure[] rather than illuminate the nature of the materials withheld”); *Fondo de Proteccion Soc. de los Depositos Bancarios for Banco Canarias de Venezuela, C.A. v. Diaz, Reus, & Targ, LLP*, No. 16-cv21266, 2017 WL 7792605, at *6-7 (S.D. Fla. June 15, 2017) (requiring production of detailed privilege log in lieu of a categorical privilege log).

Separately, Defendants also refuse to produce the name or other identifying information as to the produced source file for documents identified on the privilege log. *See* Ex. B, ¶ 15(j). As above, such information will assist in ascertaining Uber’s privilege claims. Uber’s refusal to include such information will lead to unnecessary disputes and litigation, and should be rejected.

II. Uber’s Proposed Timeframe for Privilege Log Production and Disputes Will Needlessly Delay This Litigation [Ex. B, Paragraph 14]

Defendants propose deferring producing any privilege logs until 120 days after the production of documents and/or ESI. This would substantially extend the timeline for completing

discovery and for the litigation overall. The review of privilege logs and subsequent resolution of related disputes are time-intensive tasks. Under Defendants' proposal, that process will not even begin until six months after the production of documents and ESI. The cascading effects of Defendants' proposed delay in producing privilege logs would include delayed supplemental document productions based on resolution of privilege disputes and attendant witness examinations. Uber's proposal is simply too protracted, particularly in this case, where the prompt completion of discovery is paramount.

Under Plaintiffs' proposal, in contrast, the parties would produce privilege logs within thirty (30) days of each production, which will allow the parties to promptly address privilege disputes on a rolling basis throughout the course of discovery, resulting in a far more expeditious discovery process. A thirty (30) day timeframe for providing privilege logs after the production of documents and/or ESI is standard in MDLs. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, No. 15-md-02672 (N.D. Cal. Mar. 29, 2016) (Breyer, J.), Dkt. 1387 at ¶ II.H, attached hereto as Exhibit D; *In re JUUL Inc., Mktg., Sales Practices & Prods. Liab. Litig.*, No. 19-md-02913 (N.D. Cal. Dec. 17, 2019), Dkt. 322 at ¶ 13, attached hereto as Exhibit E; *In re 3M Combat*, No. 19-md-2885, Dkt. 442 at ¶ X(A), attached hereto as Exhibit F; *In re Xarelto Prods. Liab. Litig.*, No. 14-md-02592 (E.D. La. June 4, 2015), Dkt. 951 at ¶ 1, attached hereto as Exhibit G.

III. Uber's Proposed Limitations on the Use of Disputed Privileged Materials Will Hinder the Court's Ability to Efficiently and Fairly Adjudicate Privilege Disputes [Ex. B, Paragraphs 5, 6,7]

Defendants take the position that Plaintiffs may not present a disputed document to the Court to challenge a privilege claim unless, upon Plaintiffs' motion, the Court finds (1) good cause for the document to be submitted, and (2) the Court believes that it cannot decide the issue based solely on the written submissions of the parties. Conversely, Defendants *also* take the position that they alone may submit such materials to the Court for review without a Court order.

Uber's proposal runs afoul of the federal rules, will hinder the Court's ability to efficiently and fairly adjudicate privilege disputes, and creates a double standard that should be rejected. Rule 26(b)(5)(B) allows a challenging party to "promptly present the [disputed] information to

the court under seal for a determination of the claim.” Preventing the party challenging a privilege claim from presenting that information *in camera* or otherwise to the Court or even discussing the content of the material in question prevents the parties from fully addressing the contours of the privilege dispute, which would “essentially hinder the court’s ability to make [] a [privilege] determination.” *TVIIM, LLC v. McAfee, Inc.*, 13-cv-04545, 2014 WL 12975835, at *3-4 (N.D. Cal. Aug. 14, 2014); *see also U.S. Home Corp. v. Settlers Crossing, LLC*, 2012 WL 5193835, at *5 (D. Md. Oct. 18, 2012) (“It would be wholly illogical to read Rule 26(b)(5)(B) as prohibiting the use of documents ‘subject to a claim of privilege’ when resolving that very claim of privilege.”); *Am. Nat. Bank & Tr. Co. of Chi.*, 406 F.3d, 867, 880 n.7 (7th Cir. 2005) (citing *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (“Only when the district court has been exposed to the contested documents and the specific facts which support a finding of privilege under the attorney-client relationship for each document can it make a principled determination as to whether the attorney-client privilege in fact applies.”); *SEC v. Hollnagel*, No. 07-cv-4538, 2010 WL 11586980, at *9 (N.D. Ill. Jan. 22, 2010) (noting that in camera review was done “in conjunction” with the defendants’ declarations and privilege logs, so that “the privileged nature of a communication may be established by the document itself and the circumstances relating to the communication”).

Permitting the use of the disputed material during a privilege challenge will not prejudice the producing party because the opposing party’s use of the material is limited to the instant challenge, all documents that refer to the disputed materials will be filed under seal, and the ultimate finder of fact—the jury—will only be exposed to the disputed materials if the opposing party prevails in its privilege challenge. This Court has previously required such materials to be submitted to the Court in other complex MDLs and should do so here. *See, e.g., In re Volkswagen*, Ex. D at ¶ I.J (“The Disclosing Party [] bears the burden of making the Disclosed Privileged Material available to the Court for in camera review. [] Nothing herein shall limit the right of any Party or Non-Party to petition the Court for an in camera review of Disclosed Privileged Material.”); *In re McKinsey & Co.*, Ex. C at ¶ 15 (“If a Party lodges a challenge to documents withheld on the basis of privilege, the Parties agree to in camera review of any

withheld documents by Magistrate Judge Sallie Kim in order to assist the Court in evaluating the claims of privilege asserted”).¹

IV. Plaintiffs Propose Reasonable Exclusions From Logging Requirements [Ex. B, Paragraph 20]

Defendants ask to have specific categories of documents excluded from the privilege log requirements. As a concession to Defendants, and to reasonably minimize the burden on Defendants relating to preparing and producing their privilege logs, Plaintiffs agreed to exclude certain limited categories of documents from the privilege log requirements.²

Specifically, Plaintiffs’ proposed PO allows Defendants to exclude numerous types of documents, communications, and/or ESI from privilege log requirements as long as the documents, communications, and/or ESI were created on or after March 15, 2023, the date the first case was filed that was transferred into this MDL. Complex MDLs such as this typically either use no exclusion date or use the date of the first MDL-related filed case for such privilege log exclusions. *See, e.g., In re JUUL*, Ex. E, at ¶ 17 (using the date of the first filed case transferred in the MDL as the logging exclusion date); *In re Tepezza, Mktg., Sales Practices & Prods. Liab. Litig.*, No. 23-cv-03568 (N.D. Ill. Oct. 3, 2023), Dkt. 54 at ¶ C.2, attached hereto as Exhibit H; *In re Hair Relaxer Mktg., Sales Practices & Prods. Liab. Litig.*, No. 23-cv-00818 (N.D. Ill. May 24, 2023), Dkt. 112 at ¶ 14, attached hereto as Exhibit I; *In re Zantac (Ranitidine)*

¹ Defendants also propose preventing the parties from using any information that was “based upon” a clawed back document, even prior to the Court’s determination as to any privilege claim regarding that document. *See* Ex. B, ¶¶ 5, 9. But this language is vague, overly broad, and unnecessary, as the parties will already be prevented from using any information that was “generated and contain[s]” any clawed back document.

² Beginning in 2021, the United States Courts Advisory Committee on Civil Rules began examining nuances of privilege logs under Fed. R. Civ. P. 26(b)(5) and formally proposed a modest amendment in August 2023. After much testimony and comment, the proposed rule added language to Fed. R. Civ. P. 26(f)(3)(D) that requires conferencing parties to discuss and provide detail in the discovery plan for “the timing and method for complying with Rule 26(b)(5)(A).” Preliminary Draft of the Proposed Amendments, August 2023 (https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_1.pdf). While the wholesale acceptance of categorical logs was rejected outright in the amendment, the accompanying proposed comments provide for exactly the scenario Plaintiffs have proposed: “In some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents... But the use of categories calls for careful drafting and application keyed to the specifics of the action.” *Id.*

1 *Prods. Liab. Litig.*, No. 20-md-02924 (S.D. Fla. June 1, 2020), Dkt. 779 at ¶ 2.a, attached hereto
2 as Exhibit J.

3 In contrast, Defendants propose August 12, 2021, the date the Uber JCCP was created, as
4 the exclusion date. Defendants' proposal is untenable. This MDL is not the JCCP—MDL
5 Plaintiffs have different claims, different theories of liability, and this Court will likely apply
6 different and varying state laws. Moreover, the JCCP has been ongoing for more than two years
7 and Defendants have produced virtually no discovery in that litigation, nor have they produced
8 any privilege logs. Simply put, Defendants' proposed exclusion date, which predates any case
9 filed in this MDL by almost two years, will unfairly limit Plaintiffs' ability to review Defendants'
10 privilege claims, and is not appropriately limited in scope. Plaintiffs' proposed document
11 exclusions, on the other hand, minimize the burden on Defendants related to the preparation of
12 privilege logs, are reasonably tailored to cover a portion of the documents Uber may claim are
13 subject to privilege, and are appropriately limited in scope.

14 As further concession to Defendants, in Plaintiffs' proposed paragraph 19, Plaintiffs
15 originally agreed to the log entry of "Last in Time Emails" only, when multiple email messages
16 are part of a single chain or thread, if details related to each thread message were logged. In other
17 words, the log would include one entry with details about every e-mail linked to it. This
18 compromise was offered, provided that the log entry included "the names of the authors,
19 addressees, and recipients (including copyees and blind copyees) for all thread members, that the
20 description of the thread include the factual bases sufficient to support the claim of privilege for
21 each thread member over which privilege is asserted, and that the log entry include the privilege
22 designations applicable to any thread members." Defendants refuse this concession and instead
23 propose to include only the most basic description and detail for the entirety of each withheld
24 thread.

25 Without information about each exchange included within a thread, Plaintiffs will be
26 unable to understand the extent or bounds of withheld communications; communication threads
27 that might span months or more, and involve many more individuals than those related to any
28 particular privilege. As a further compromise, Plaintiffs also proposed to include this discussion

1 as part of the ESI protocol negotiations, but Defendants again refused. Plaintiffs' original
 2 proposal or deference to the ESI protocol should be adopted.

3 **V. Uber Should Produce a List of Individuals Identified on the Privilege Log in**
 4 **Order to Ascertain Privilege Claims [Ex. B, Paragraph 18 (and preceding**
 5 **paragraph)]**

6 Plaintiffs' Proposed PO requires the parties to produce a separate list of individuals
 7 identified on the privilege log that includes the individuals' names, job titles, and employers.
 8 Plaintiffs require this information to ascertain Defendants' privilege claims. Without this
 9 information, Plaintiffs will not be able to determine if an individual on the privilege log even
 10 worked (or currently works) for Uber, let alone what department they are or were in.

11 Defendants refuse to produce this list, stating that it would be too burdensome. But
 12 Defendants have previously produced a list of names/job titles for its employees on a litigation
 13 hold within a week of this Court's Order. While Uber may argue that Plaintiffs can reference that
 14 list, Defendants can easily produce a list narrowed to individuals identified on a privilege log.
 15 And there are likely many more individuals who will be noted on privilege logs but who are not
 16 identified on the existing litigation hold list. Such lists are common in complex MDLs and
 17 should be required here. *See, e.g., In re Xarelto*, Ex. G, at ¶ 5; *In re Zantac*, Ex. J, at ¶ III.

18 **CONCLUSION**

19 For the reasons stated above, Plaintiffs respectfully request the Court adopt Plaintiffs'
 20 proposed Privilege Order.
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1 Dated: January 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of the filing to all counsel of record.

By: /s/ Sarah R. London